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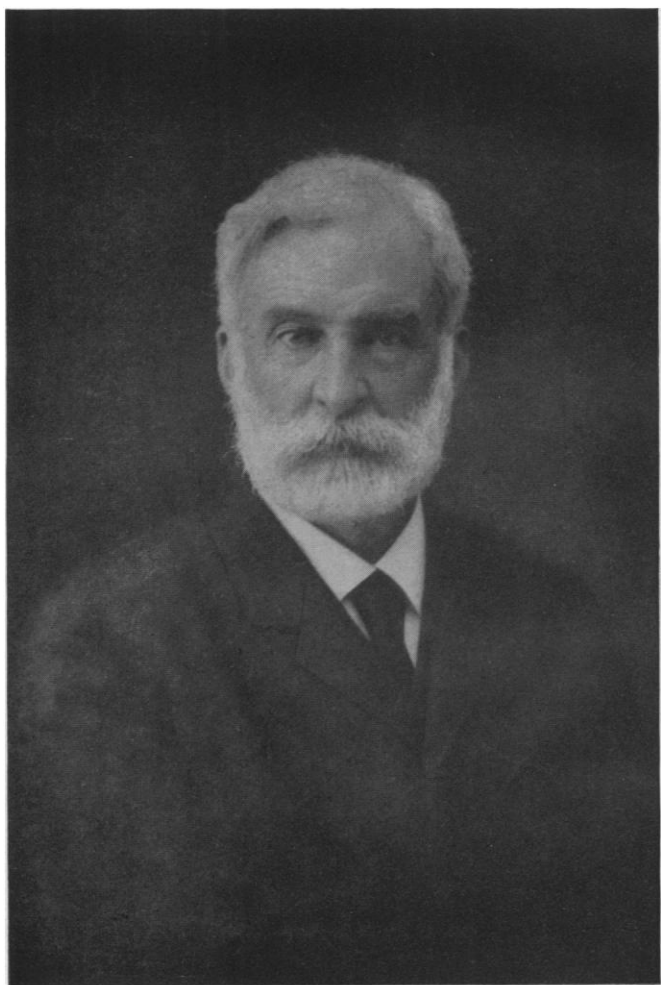
NO. 1

JEREMIAH SMITH

JEREMIAH SMITH, second of that name, died at St. Andrews, New Brunswick, September 3, 1921, in the eighty-fifth year of his age. He was the last of that older generation of teachers who conducted the Harvard Law School in the deanships of Langdell and Ames, and shared the enthusiastic and affectionate admiration which their pupils gave to these remarkable men. His life, like theirs, was full, useful, happy; like theirs, too, his death was a peaceful, painless falling asleep. Faithful all: and all alike enshrined in the hearts of thousands of men of law throughout the nation.

Judge Smith came of forbears to whose vigor of mind and body the best blood of New Englander and Scot contributed. His father, born in 1759, was Revolutionary soldier, legislator, member of Congress, Judge of the United States Circuit Court, Chief Justice and Governor of New Hampshire. After surviving his first wife and their children he married, at the age of seventy-one, a second wife; and his son Jeremiah was born in 1837. The father died five years later.

The son was educated at Phillips Exeter Academy and at Harvard, graduating with the degree of A.B. in 1856, and A.M. in 1859; after a year in the Harvard Law School he went to Dover, where he was admitted to the bar in 1861. In 1867, at the age of thirty he was appointed to the bench of the Supreme Court of New Hampshire.



Jeremiah Smith

This court was the principal trial court of the state, as well as the law court; and it sat for both purposes in every county of the state.

The venerable and revered Chief Justice Perley was in his last year of service. The vigorous and painstaking Bellows, soon to be Perley's successor, was one of the older members; and Doe, one of the greatest of our American judges, had recently taken his seat on the bench. The next vacancy was to be filled by the brilliant Foster. It was a strong court, and one in which Judge Smith, short as was his term of service, took a prominent part. The writing of opinions was not laborious,—in his seven years of service Judge Smith hardly finished his fourth score,—but the trial work was heavy and difficult. The confinement indoors, the bad air of the primitive court-rooms, perhaps the atmosphere of petty contention always so distasteful to him, sapped his strength and he was seriously threatened with tuberculosis. He resigned, and went for several years to Minnesota. In the bracing air of that state he was completely cured.

While he was called upon to write few opinions during his service on the Supreme Court, several of these were distinguished. His best-known opinion is probably that in *Eaton v. Boston, Concord & Montreal Railroad*.¹ In this masterly essay on the nature of property, the force of an unconstitutional statute, and the meaning of a "taking" by eminent domain, Judge Smith established the law as it is generally held to-day upon an impregnable basis. *Eastman v. Clark*² is an important decision on the nature of partnership. *Rich v. Errol*³ denies the power of a selectman to bind the town by a promissory note. *Northern Railroad v. Concord Railroad*⁴ is a scholarly investigation of the consequences of an equal division of the judges on appeal. *State v. Franklin Falls Company*⁵ deals with the right to obstruct a fishway, and the possibility of barring it by adverse use. *Palmer v. Concord*⁶ is a nice question of libel and of causation arising upon the destruction of property by a mob. These and all his opinions are characteristic: learned without

¹ 51 N. H. 504 (1872).

² 53 N. H. 276 (1872).

³ 51 N. H. 350 (1871).

⁴ 50 N. H. 166 (1870).

⁵ 49 N. H. 240 (1870).

⁶ 48 N. H. 211 (1868).

prolixity, full of common sense, but searching first for legal principles, lawyer-like, convincing, sane.

Upon his return to New Hampshire after the re-establishment of his health, Judge Smith entered practice again at Dover, and at once became a leader of the bar of the state. His secure position and lofty character, his strong public spirit, joined with a mind excellently qualified to think through and present clearly the most intricate legal problems raised by modern industrial conditions, led to his useful employment in the difficult causes of the whole state. He seems always to have shown an interest in the recruiting of the legal profession. A lecture he delivered before the students of Harvard College on "The Law as a Profession" greatly impressed those who heard it. Soon after the delivery of this lecture, in 1890, he was appointed Story Professor of Law.

The appointment of a man to teach law after thirty years of practical life is an experiment fraught with more danger now than when, two generations ago, teaching was neither an art nor a profession. Many men have tried it and failed, others have become tolerable teachers; a few have reached success in time by making experience their ladder. Judge Smith attained success almost from the first. His method differed from those of his colleagues,—indeed they all differed from one another,—but he made his students think, and he so presented his subjects that they remembered the law he taught. In his first year his courses were Torts, Agency, and Corporations: a stiff dose for a new teacher who had not recently received instruction in the courses. One reason for the greater immediate success as teacher of law of one who has graduated within a few years is that he has recently been familiar with the methods of teaching, and very probably with the very subject-matter he is to teach and the book from which he teaches it. Judge Smith had no such help. There was indeed a case book in Torts, but it covered only half the subject-matter of the course. In Agency there was a list of cases which Professor Keener had been using in the course. Corporations was a new course altogether, and the few lectures on the subject which Professor Ames had been giving at the end of his course in Partnership can have been of little help. Judge Smith's success as a teacher in his first year was the highest proof of his skill in teaching. He taught two other subjects later,—Persons, and the Interpretation of Statutes; but Torts

and Corporations continued to be his principal subjects, and in the domain of Torts he made investigations and wrote articles which distinctly advanced scientific knowledge of this important and very modern portion of the law.

During his twenty years' service as teacher in the Harvard Law School he won the respect, the admiration, and the affection of pupils and colleagues alike. It was his immediate adoption of the case method of teaching which Langdell regarded as the mark of its complete success; and the experience upon the bench and in active practice which he brought to the school was a welcome element in the diversity of gifts within the faculty. As a teacher he was clear and painstaking, pointing out difficulties rather than glossing them over. He was interested in his pupils; and those in particular who came from New Hampshire soon learned that he knew their families, and expected much of them. On reaching his seventieth year he expressed a wish to retire; but at the earnest request of his colleagues he remained two years longer, until he had completed twenty years on the faculty; he then retired, in 1910, full of honors, happy in the thought that the only thing his colleagues and his pupils regretted about his membership in the faculty was his ending of it.

After his retirement he continued his regular methods of work. Every working day he spent several hours in the Library, at a table in the stack; and there he wrote several of his most useful legal essays, and with reluctance—for he modestly doubted their value—he published them. Among these articles may be mentioned: "Legal Cause in Actions of Tort,"⁷ a careful and suggestive article on a subject just coming into prominence; "Sequel to the Workmen's Compensation Acts,"⁸ a thoughtful consideration of one of the fundamental principles in Torts; "Tort and Absolute Liability,"⁹ a further discussion of the fundamental requisites for liability; "Liability for Substantial Physical Damage to Land by Blasting,"¹⁰ a careful and critical examination of the theories on the subject.

He accepted an honorary degree from Dartmouth "in his youth," as he apologetically explained; but he refused the degree of LL.D.,

⁷ 25 HARV. L. REV. 103, 223, 303 (1917).

⁸ 27 HARV. L. REV. 235, 344 (1914).

⁹ 30 HARV. L. REV. 241, 319, 409 (1917).

¹⁰ 33 HARV. L. REV. 542, 667 (1920).

which he might several times have had from Harvard, because he would not appear in person at Commencement to receive it. No one more avoided display. He probably never attended the Commencement exercises after robes were worn. He disliked also contentious argument. He never would defend his opinions after he had explained them. If a pupil attempted to question his views on a point of law, and cited the alleged opinion of a colleague as against his own, he invariably replied, "Mr. A. is undoubtedly right and I am wrong," and said no more. So absolutely modest and gentle was he!

Goodness, gentleness, purity, modesty—what blessed quality did he lack? And withal he was a thinker whose mind remained active and intensely modern to the last day of his life, and a thorough scholar, whose work in the newer aspects of Torts commands the study of every worker in that field of the law.

Of his qualities and his services to the law several of his associates and successors on the faculty have spoken. Dean Pound, successor in his professorship and his principal course, writes: "So open-minded a man of his years—or any years—is a rare phenomenon. Nor do I think we commonly appreciate the great influence he had on the law of Torts. His part of Ames & Smith shaped a great deal of current thinking." Professor Williston has said:¹¹ "Distinguished as was his career as practitioner, judge, teacher, scholar and writer, it is not in these aspects that his friends will first or chiefly recall him, but as one of the best and kindest men who ever trod the earth. He had a marvellous faculty for distinguishing and remembering persons. A class of students, however large, was never to him merely a collective unit. Each member was a distinct individual, and it was surprising how often he would identify a student's father or uncle or cousin as an old friend, or find some other thread with which to bring himself closer to the young man; and no trouble was too great if it would aid a student either in intellectual problems, or in personal difficulties. This affectionate interest in his students seemed no effort, but the spontaneous manifestation of a kind and sympathetic nature. All who were ever his pupils can be called to testify that his interest in them was warmly appreciated. His younger colleagues still more deeply treasure the

¹¹ *Boston Transcript*, September 6, 1921.

memory of a companion whom this brief notice too inadequately portrays."

In a characterization in the manner of Chaucer, Professor Wambaugh wrote.¹²

"Wide was his law, and wide his common sense —
For learning could not make that sound head dense.
Wide was his taste for men and eke for reading —
Old heads and young, old books and new, all leading
Unto the wisdom of the perfect man,
And all him keeping young as he began,
Till you 'gan wonder, all that you were able,
How one so young could be so venerable.
And, best of all, his charity was kind —
In all the world no enemy could find."

Professor Frankfurter, one of his pupils, writes: "No teacher could more persistently have taught loose-minded youth the great lesson of thinking things, not words. Judge Smith was neither deluded nor deterred in his thinking by phrases, however time-honored and authoritative. He compelled his students, sweetly but relentlessly, to cross-examine words like 'malice,' 'coercion,' 'rights,' and other enemies of clear thought, until they pierced beneath the labels to the conflicting interests which they covered. This method was one manifestation of his deep devotion to the painful pursuit of truth, of his belief in unflagging loyalty to reason as the essential condition of ordered life. He was effective in conveying that lesson to his students because he lived, and not merely taught, a life of calm and unflagging devotion to the conquest of truth. Never did he give deeper proof of this faith than during his last years. All about him men, whose training and position imposed the *noblesse oblige* of the disciplined mind, were carried away by post-war fears and hysteria. Judge Smith wanted to *understand*. He sought and read out-of-the-way reports and documents — the coal report of Mr. Justice Sankey, for instance — in order to come closer to the real issues, and to realize more vividly the human impulses back of the crude expression of them, in the tangled and vexed field of industrial relations. He who did so much, with insight and disinterestedly, to formulate the legal issues in

¹² *In re* J. S., 16 GREEN BAG, 803.

labor controversies, insisted to the last day of his life on knowing the facts; and, knowing, he brought the serene calm of his mind to bear upon the solution, with patience and with tolerance even for views which he did not share. To the end, in his ninth decade, he believed unflinchingly in the processes of a sympathetic, searching mind as the prerequisite of legal thought."

Professor Chafee writes: "Precise and thorough as he was in his definition of legal rights and duties, Judge Smith had little respect for the man who always insists on those legal rights, and will not do more than the law requires. It was his wont each year, after showing how few positive acts were demanded by the law, to recommend the students to read the last part of the twenty-fifth chapter of Matthew, and thus call to mind the obligations above and beyond law.

"I knew Judge Smith only after his retirement, but he was constantly in the Law School Library, arriving early in all weathers, and working hard as if he wanted to learn the law all over again. Though he taught the students no longer, the faculty was privileged for many years in the opportunity of learning from him. It was a pleasure to show him some new striking case in Torts, and see his eager interest and listen to his discriminating analysis. He had, moreover, a quality which I have never seen equalled in any one else: an intimate knowledge of biographical and historical facts which enabled him to furnish a background of reality for any important legal controversy in America during the last century. He drew not only on his wide reading in legal biography, but also on local tradition and the friendships of a long life. His power of stating the personal characteristics of judges and eminent lawyers was always delightful.

"Judge Smith was no *laudator temporis acti*. Despite his knowledge of the past, he was never gloomy about the present. Perhaps his memories of the intolerance of the Civil War, which men later came to regret, enabled him to touch on present disputes with calmness and breadth of vision. He continually gave encouragement and valuable suggestions to younger men, engaged with the controversial issues of their day. His hopefulness made him seem a contemporary; but he combined with the modernity of his thought the experience and wisdom of age. As one leaves youth behind, the problem of growing old well acquires unexpected importance.

Judge Smith will always stand out as a man who had mastered that problem. As his years, so was his strength; and to the last each day brought him new pleasures and new work."

It is delightful to see how to each of these associates the remarkable qualities of Judge Smith made its appeal. Few men have been able so to satisfy such varying qualities among their friends, or to keep the mind so young in interest, so old in experience.

Joseph H. Beale.